COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2014-SC-000241-D

JONATHAN H. MCDANIEL — APPELLANT

ON REVIEW FROM COURT OF APPEALS
VS. 2012-CA-001299
CALLOWAY CIRCUIT COURT, NO. 09-CR-00181

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, the foregoing "Brief for Appellant" was served by first class mail upon the following: Hon. C. Mark Blankenship, Commonwealth Attorney, 309 North 4th Street Murray, KY 42071; Hon. Dennis R. Foust, Judge, Marshall County Courthouse 80 Judicial Dr., Unit 101 Benton, KY 42025; Hon. Christian Miller, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; Hon. Jack Conway, Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; Sam Givens, Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601

I also certify that the record has been returned to the Supreme Court of Kentucky.

INTRODUCTION

The Court of Appeals erred when it affirmed the Calloway Circuit Court's order denying Jonathan McDaniel's *pro se* Motion to Amend Sentence. Specifically, the Court of Appeals erred by construing Mr. McDaniel's *pro se* Motion to Amend Sentence as a motion brought pursuant to RCr 11.42. However, even if this Court determines that Mr. McDaniel's motion was indeed an RCr 11.42, Mr. McDaniel is still entitled to relief as the Court of Appeals also erred by holding that the sex offender conditional discharge imposed upon Mr. McDaniel does not violate due process. Mr. McDaniel appeals from the Court of Appeals order affirming his conviction and sentence in Calloway Circuit Court.

STATEMENT OF ORAL ARGUMENT

The Appellant requests that the Kentucky Supreme Court hold oral arguments in this case.

STATEMENT CONCERNING CITATIONS

The transcript of record will be cited as "TR" with the volume and the page number cited directly following (e.g. TR 1). The proceedings contained on the video will be cited in conformance with CR 98(4)(a).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 19, 2009, Jonathan McDaniel was indicted on one count of first-degree sexual abuse, victim under 12 years of age. (TR 1). The indictment alleged that the offense was committed on May 19, 2009. (*Id.*). The Commonwealth presented an offer on a plea of guilty which listed the charged offense as first-degree sexual abuse, victim under 12, a Class C felony. (TR 29). The offer provided that the Commonwealth would recommend a sentence of six years to serve, allocution to the family of the victim, and no contact with the victim or victim's family. (*Id.*). There was no mention of a five-year conditional discharge period listed as part of the sentence on this offer. (*Id.*).

In open court on March 12, 2010, Mr. McDaniel accepted this offer. (VR CD: 3/12/10, 10:32:50). During the guilty plea, Mr. McDaniel stated his understanding of the sentence to be six years and no contact with the family. (*Id.*). Trial counsel for Mr. McDaniel then stated for the record that because this was a sex offense, Mr. McDaniel would have to complete a sex-offender treatment program (SOTP) before becoming parole eligible and that he would not be subject to probation or shock probation. (*Id.*). At the time of the guilty plea, there was no mention of a five-year conditional discharge period. (*Id.*).

Mr. McDaniel appeared before the circuit court on May 10, 2010 for sentencing. (VR CD: 5/10/10, 9:40:45). During the sentencing, the court informed Mr. McDaniel that he was sentenced to serve six years, court costs were waived, jail costs were imposed, a five-year period of conditional discharge was to be imposed, he was required to register as a sex offender, and DNA would be collected for inclusion in a national database. (VR CD: 5/10/10, 9:52:20). A Judgment and Sentence on Plea of Guilty was entered on May

10, 2010, which adopted the Commonwealth's recommended sentence and further provided for the five- year conditional discharge period. (TR 35-36).

On May 23, 2012, Mr. McDaniel filed, *pro se*, a Motion to Proceed *In Forma Pauperis* and Appointment of Counsel and a Motion to Amend Sentence. (TR 47-50). In the Motion to Amend Sentence, Mr. McDaniel asserted that KRS 532.043, which subjected him to conditional release, was unconstitutional and therefore, his sentence was required to be amended. As authority for his argument, Mr. McDaniel cited U.S. Constitutional Amendments V, VI, and XIV, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Jones v. United States*, 526 U.S. 227 (1999), *Bailey v. Commonwealth*, 70 S.W.3d 414 (2002), and *Ladriere v. Commonwealth*, 329 S.W.3d 278 (2010). (*Id.*). Without appointing counsel to represent him, the circuit court determined that none of these cases were applicable to Mr. McDaniel's case and that Mr. McDaniel was required to be sentenced to the period of conditional discharge as set forth in the statute. (TR 52-56). The circuit court denied his motion in an order entered June 15, 2012. (*Id.*).

Despite denying Mr. McDaniel counsel below, the circuit court appointed counsel to represent Mr. McDaniel on appeal of his *pro se* motion. (TR 64). On appeal, the Department of Public Advocacy sought to withdraw pursuant to KRS 31.110. The Court of Appeals denied that motion and the Department assigned counsel to represent Mr. McDaniel and his *pro se* claims on appeal.

The Court of Appeals consolidated Mr. McDaniel's case with that of John C. Martin, and David L. DeShields. (Court of Appeals No. 2012-CA-001172-MR). The Court of Appeals went on to affirm Mr. McDaniel's conviction and sentence in an order rendered April 4, 2014. In its order affirming, the court held that Mr. McDaniel's

motion, which failed to invoke a particular statute upon which it was brought, was to be construed as a motion brought pursuant to RCr 11.42 rather than CR 60.02. The Court reasoned that RCr 11.42 motions were meant to attack all grounds for holding a sentence invalid, and that *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983) requires an RCr 11.42 motion to precede CR 60.02 motions. The Court of Appeals further held that the current post-incarceration supervision revocation procedures do not violate due process and that they in fact afford a defendant greater protections. Mr. McDaniel sought discretionary review from this Court of that order. This Court granted discretionary review and ordered briefs to be filed in this case.

STANDARD OF REVIEW ON APPEAL

The resolution of this appeal does not involve a dispute over the facts of this case. Rather, this appeal deals with questions of law: 1) how should the appellate courts construe a motion that fails to cite authority under which it is brought, and 2) does the imposition of post-incarceration supervision violate due process? Because these arguments represent questions of law, the matter is reviewed de novo. *Kentucky Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 372 (Ky.App. 2008).

ARGUMENTS

ARGUMENT I

THE COURT OF APPEALS ERRONEOUSLY HELD THAT MR. MCDANIEL'S MOTION WAS TO BE CONSTRUED AS AN RCR 11.42 MOTION.

Issue Preservation

This claim was preserved by Mr. McDaniel's *pro se* Motion to Amend Sentence, the circuit court's Order denying, and the Court of Appeals Order affirming. (TR 52-56, Court of Appeals No. 2012-CA-001299-MR).

Discussion

The Court of Appeals concluded that Mr. McDaniel's Motion to Amend was made pursuant to RCr 11.42 because it determined that RCr 11.42 was the most procedurally proper method to present Mr. McDaniel's claims, and because it was labeled a Motion to Amend. *Slip op.* at 2-3. Specifically, the Court of Appeals reasoned that *Gross* requires RCr 11.42 motions to be filed prior to CR 60.02 motions, and because Mr. McDaniel had not previously filed an RCr 11.42 motion, the motion must be deemed as made pursuant to RCr 11.42. *Slip op.* at 3. This conclusion is faulty in two regards. First, the court is confusing what a defendant *should do* versus what a defendant *actually does*. Second, the language in *Gross* does not mandate that RCr 11.42 motions precede CR 60.02 motions, but rather instructs that CR 60.02 is only available for those claims that cannot be otherwise litigated on direct appeal and through RCr 11.42. Again, this rule instructs defendants how post-conviction motions *should be brought*, but ignores the filer's intent and how the parties relied in resolving the motion below.

The Court of Appeals held that *Gross v. Commonwealth*, 548 S.W.2d 853, 856 (Ky. 1983) requires that a defendant first file an RCr 11.42 petition before moving for relief pursuant to CR 60.02, thus Mr. McDaniel's motion must be made pursuant to RCr 11.42. This is simply not correct and is an illogical interpretation of *Gross*.

Gross states as follows:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.
>
> Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be

> aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 foreclosed the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 857. Nowhere in the passage above does it state that if a defendant files a CR 60.02 motion prior to an RCr 11.42 motion then he may no longer file an RCr 11.42 motion, or that a defendant must first file an RCr 11.42 claim before bringing a claim under CR 60.02. The passage simply means that a defendant should not set forth in a CR 60.02 motion those issues which could and should be brought in an RCr 11.42 motion. *Sanders v. Commonwealth* sets forth the rule as follows: "The rule is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather, 'is for relief that is not available by direct appeal and not available under RCr 11.42.'" 339 S.W.3d 427, 437 (Ky. 2011) *citing Gross, supra.* Thus, if the relief a defendant seeks cannot be attained through either direct appeal or RCr 11.42, he can first file a CR 60.02 motion. This in no way precludes a defendant from thereafter filing an RCr 11.42 motion if he otherwise meets the requirements of the statute and the issue has not been raised and decided in a prior proceeding.

It is not within the court's jurisdiction to alter a litigant's pleading to conform to how it believes the motion should have been drafted. "The intention of the pleader is the controlling factor in construing a pleading." 71 C.J.S. Pleading § 79 (citing *Gover v. Cleveland*, 299 S.W.2d 239 (Mo. Ct. App. 1957); *Gulf, C. & S.F. Ry. Co. v. Bliss*, 368 S.W.2d 594 (Tex. 1963); *Erie Ins. Group v. Grange Mut. Cas. Co.*, 889 N.E.2d 585 (6th Dist. Erie Co. 2008)). Thus, it is the court's responsibility to discern the litigant's intent, whether or not that intent is ultimately deemed by the court to be procedurally

appropriate. To allow otherwise serves to frustrate a litigant's objective to have a claim litigated in a particular manner, including the relief sought, scope of review, and timing of the filing. This is especially true when the litigant is seeking to present a claim in a new or unprecedented manner, or seeking to create new law. Thus, it is not appropriate for the court to manipulate the litigant's intent to conform to its determination of best practice.

It is clear that this Court, through its case law, has determined what types of post-conviction matters are appropriate under RCr 11.42 and which ones are appropriate under CR 60.02. *See Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983); *Winstead v. Commonwealth*, 327 S.W.3d 479 (Ky. 2010); *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972); *Polsgrove v. Commonwealth*, 439 S.W.2d 776 (Ky. App. 1969). Very often a *pro se* litigant will file a motion, citing CR 60.02, which alleges claims that this Court has said must be raised in an 11.42 or should have been raised in an 11.42, although the time for doing so has passed. *Gross,* 648 S.W.2d at 857. In that instance, the intent of the litigant is clear–he requested relief pursuant to CR 60.02, although the proper avenue for relief would have been through RCr 11.42. In that situation the court does not alter the intent of the litigant and conclude that the motion is to be treated as an RCr 11.42 motion simply because that is what the motion *should have* been filed as. Such a result is improper and produces an absurd result. While Mr. McDaniel did not state in his motion that it was to be treated as made pursuant to CR 60.02, interpreting the motion as made pursuant to RCr 11.42 is contrary to his intent and results in the same absurdity.

The Court of Appeals also stated as grounds for its conclusion that the motion had been titled a Motion to Amend. *Slip op.* at 2. By doing so, the appellate court construed

the motion technically instead of substantively. *See Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98 (Tenn. 2010); *Ex parte Bender Shipbuilding & Repair Co., Inc.*, 879 So. 2d 577 (Ala. 2003); *Martin v. Pierce*, 257 S.W.3d 82 (2007); *Carter v. State*, 996 A.2d 948 (2010); *Meadows v. Blake*, 36 So. 3d 1225 (Miss. 2010); *City of Midwest City v. Public Employees Relations Bd.*, 69 P.3d 1218 (Div. 1 2003). "[T]he character of a pleading is ascertained from its subject matter, not its title or label, in a manner promoting fair play and substantial justice." *Padgett v. Steinbrecher*, 355 S.W.3d 457, 460 (Ky. App. 2013) (citing CR 8.06). Thus, it was improper for the appellate court to simply conclude that the motion should be treated as an RCr 11.42 motion based upon its title and the fact that Mr. McDaniel had not previously filed an RCr 11.42. Here the court looked at the title "Motion to Amend" as rendering it an RCr 11.42 motion, when in reality the substance of the motion asserted a basis for holding his judgment void, which is an appropriate claim under CR 60.02.

The function of interpreting pleadings rests primarily with the trial judge. *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 490 (1943). Thus, it can be instructive to see how the circuit court treated the motion, as well as how the Commonwealth interpreted the motion and ultimately relied in responding to the motion. Other courts have held that where the parties construe the pleadings a certain way, the reviewing court should adopt such a construction if possible. *See Dornfried v. October Twenty-Four, Inc.*, 646 A.2d 772 (1994); *Parr v. Pichinson*, 370 S.W.2d 941 (Tex. Civ. App. San Antonio 1963), writ refused, (Nov. 20, 1963). While not controlling, the construction a party places on his or her own pleading should be, at a minimum, persuasive. *See Powers v. Bellows Falls Hydro-Electric Corp.*, 57 A.2d 114 (Vt. 1947); *Werner Spitz Const. Co. v. Vanderlinde*

Elec. Corp., 314 N.Y.S.2d 567 (N.Y. Co. Ct. 1970). Neither Mr. McDaniel's motion nor the Court's order denying states a procedural rule; however, it was, and always has been, Mr. McDaniel's intent that this motion be treated as made pursuant to CR 60.02, which was conveyed to the appellate court. *See slip op.* at 2-3. First, Mr. McDaniel proceeded before the circuit court *pro se* and is entitled to leniency in the interpretation of his pleadings. *See Million v. Raymer*, 139 S.W.3d 914, 920 (Ky. 2004) ("This Court has many times held that when a prisoner elects to proceed *pro se*, he is not subject to the same standard of pleading as is legal counsel; and that rules are to be construed liberally in his favor.") (Internal quotation marks and citation omitted); *Miller v. Commonwealth*, 458 S.W.2d 453, 454 (Ky. 1970) ("Where the prisoner is proceeding *pro se*, as here, we do not impose on him the same standards as those applied to legal counsel.") (Internal punctuation and citation omitted); *Moore v. Commonwealth*, 394 S.W.2d 931, 932–33 (Ky. 1965) ("[W]e are not disposed to be too strict in application of procedural rules to an indigent prisoner who is without counsel."). Thus, the Court of Appeals should have attributed persuasive value to Mr. McDaniel's intent.

As this Court and the Court of Appeals are well aware, incarcerated defendants are very familiar with RCr 11.42 and what type of relief it is meant to obtain. Further, just as these defendants are familiar with the rule, so are the courts. Thus, it would be a stretch to conclude that any of the defendants intended to bring their motions pursuant to RCr 11.42, or that the courts believed that the defendants intended same without ever citing the rule or any related case law. Despite none of the parties intending to treat or actually treating this motion as one made pursuant to RCr 11.42, the Court of Appeals concluded that it must have been so because that is the rule under which the defendant

was supposed to seek relief, and it was titled as seeking to amend the conviction. *Slip op.* at 2-3.

However, RCr 11.42 is not the sole vehicle for this form of relief; CR 60.02 can also provide this form of relief, and is frequently employed by convicted defendants in the post-conviction setting. *See* John S. Gillig, *Kentucky Post–Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 Ky. L .J. 265, 295–330 (1994–95). Thus, the basis asserted by the Court of Appeals for interpreting Mr. McDaniel's Motion was not only inappropriate, but also unpersuasive, since this basis is just as likely to support the contention that the motion should be treated as being made pursuant to CR 60.02.

> CR 60.02 was enacted as a statutory codification of the common law writ of *coram nobis*. The purpose of *coram nobis* was to bring pronounced judgment errors before the court which (1) had not been heard or litigated, (2) were not known or could not have been known by the party through the exercise of due diligence, or (3) the party was prevented from presenting due to duress, fear, or some other sufficient cause.

Baze v. Commonwealth, 276 S.W.3d 761, 765-66 (Ky. 2008), *citing Gross*, 648 S.W.2d at 856. "CR 60.02 is an appropriate vehicle by which to seek relief from a judgment that is no longer valid because it violates a constitutional right that was not recognized as such when the judgment was entered." *Bowling v. Commonwealth*, 163 S.W.3d 361, 365 (Ky. 2005). Thus, CR 60.02 not only affords the relief sought by Mr. McDaniel, but is also consistent with the type of claim he has raised, consistent with all parties' intent and resolution of the claim. Defendants are only permitted to file one RCr 11.42 motion. RCr 11.42(3); *Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971). Because Mr. McDaniel's motion contains but a single claim regarding the constitutionality of a

sentencing statute, this motion does not look like, nor does it possess the characteristics often associated with RCr 11.42 motions, and thus should not be interpreted as such.

However, even if this Court were to affirm the Court of Appeals holding that the motion in question is to be construed a made pursuant to RCr 11.42, Mr. McDaniel is still entitled to relief. Mr. McDaniel was sentenced on May 10, 2010, and filed his pro se Motion to Amend Sentence on May 23, 2010, well within the three-year period required to file an RCr 11.42 motion. As stated previously, although CR 60.02 was an appropriate means under which to bring this claim, it was not the only means, for RCr 11.42 was also available to him. While Mr. McDaniel finds fault with the Court of Appeals interpretation of *Gross v. Commonwealth, supra,* and its application to this case, regardless of whether this Court affirms or rejects the Court of Appeals' holding that Mr. McDaniel's motion is to be construed as made pursuant to RCr 11.42, Mr. McDaniel is still entitled to the relief sought in the motion.

ARGUMENT II

THE REVOCATION PROCESS FOR THE POST-INCARCERATION SUPERVISION WHICH WAS IMPOSED UPON MR. MCDANIEL VIOLATES DUE PROCESS ENSURED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO SECTIONS 2, 7, AND 11 OF THE STATE CONSTITUTION.

Issue Preservation

This claim was preserved by Mr. McDaniel's *pro se* Motion to Amend Sentence, the circuit court's Order denying, and the Court of Appeals Order affirming. (TR 52-56, Court of Appeals No. 2012-CA-001299-MR).

Summary

The amended procedures to revoke a defendant's post-incarceration supervision brought about by the legislative action following this Court's holding in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), provide far fewer safeguards and less due process than the previous procedures. In moving the power to revoke a sex offender's supervision from the judiciary to the executive branch, the legislature affords defendants less constitutional due process than previous versions of the statute. This lack of due process results in a fair notice violation. The application of the new provisions to defendants who committed their offenses prior to the enactment of the new provisions is a constitutionally-prohibited ex post facto violation.

Discussion

Mr. McDaniel was charged on December 17, 2009, with a single offense alleged to have occurred May 19, 2009. (TR 1). He pled guilty on March 12, 2010, and was sentenced on May 10, 2010. (TR 35-36). During this time period and subsequently, there were significant changes to KRS 532.043, the statute proscribing the supervised period following the conclusion of an incarceration sentence for certain sex offenders.

On April 22, 2010, the Kentucky Supreme Court issued an opinion for *Jones v. Commonwealth*, *supra*, which held that Section 5 of KRS 532.043 was unconstitutional as a violation of §§ 27 and 28 of the Kentucky Constitution, which provided for separation of powers between the three branches of government. *Jones, supra* at 300. This opinion became final on September 23, 2010, following the denial of a petition for rehearing. *Jones*, *supra*. This opinion resulted in the absence of a mechanism for the revocation of a defendant's violation of the terms of his release under KRS 532.043. This was the state of KRS 532.043 at the time that Mr. McDaniel was sentenced. So while

there was a provision requiring him to serve a five-year conditional discharge sentence, there was no constitutional, legislatively-enacted way for him to be revoked.

KRS 532.043 was amended in 2011 and was made immediately effective on March 30, 2011. KRS 532.043 renamed "conditional discharge" "postincarceration supervision." Section 4 of the statute was amended to provide that those on postincarceration supervision were supervised by Probation and Parole "under the authority of the Parole Board." KRS 532.043(4). Lastly, Section 5 was amended to reflect that any violations of postincarceration supervision should be reported to the Division of Probation and Parole, as opposed to the Commonwealth's Attorney's offices, and notice of the violation should be given to the Parole Board for a probable cause determination, as opposed to the circuit court. KRS 532.043(5).

Despite the enactment of the amended version of KRS 532.043 on March 30, 2011, the regulations providing the process for actually revoking defendants was not effective until May 6, 2011. 501 KAR 1:070. So, while the statute correctly gave authority to the Parole Board to revoke the postincarceration supervision, there still was no mechanism or procedure in place to revoke the defendants until this regulation was adopted in May. The Parole Board did not adopt new policies and procedures for postincarceration supervision until February 2012. The Department of Corrections did not adopt policies and procedures for postincarceration supervision, sexual offender supervision, or preliminary revocation hearings until March 12, 2012.

The Court of Appeals, in affirming the denial of Mr. McDaniel's post-conviction motion, held that the new revocation procedure actually afforded a defendant with more due process than the previous procedure. While the new procedure provides more steps

to revocation, it does not provide additional safeguards against revocation and in many aspects makes revocation more likely. The new procedure fails to provide constitutionally adequate due process in several ways.

A Lack of Discretion in Initiating Proceedings

First, the new revocation procedure eliminates discretion that reduced the likelihood of revocation under the previous procedure. Under the previous procedure, a parole agent, in his or her discretion, could notify the Commonwealth Attorney of an alleged violation and the Commonwealth Attorney – an elected official who is independent in nature and not employed by the Department of Corrections – could elect to or decline to file a motion with the circuit court to revoke the SOCD. Under the new procedure, probation agents are mandated to report all violations to the Parole Board and Commonwealth Attorneys are eliminated entirely.[1] (501 KAR 1:070 (1)) Thus, under the previous procedure, an agent could use his or her discretion in determining whether a minor infraction warranted notifying the Commonwealth's Attorney and seeking a revocation order; however, under the new procedure, all infractions, including minor ones, such as a speeding ticket or a single late report, must be reported to the Parole Board. Further, under the old procedure, even if notified, the Commonwealth's Attorney could exercise discretion not to seek revocation. No such discretion exists under the new procedure.

More Hearings, Fewer Safeguards

[1] Notably, this legislative change was not mandated by *Jones*. *Jones* only required that the court system be removed from the process to satisfy separation of powers concerns. While it is the legislature's prerogative to also remove Commonwealth's Attorneys from the process, it was not legally required. In this case, removing the involvement of the Commonwealth's Attorney also removed discretion from the process and contributed to the ex post facto problem with the new revocation procedure.

Second, the amended procedure calls for two hearings, but still manages to afford a defendant fewer safeguards to ensure reliable outcomes at the proceedings. Prior to the enactment of the amended version of KRS 532.043, revocation was within the authority of the circuit court, and KRS 533.050 required the circuit courts to hold a single hearing where the defendant was represented by counsel and had been given notice of the grounds for the revocation. *See Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky. App. 1986); *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002). The procedure used in probation revocations was adopted by the circuit courts for purposes of conditional discharge revocations. Under this old procedure, the involvement of the circuit courts also meant that the Rules of Evidence applied to the proceeding, while no such rules apply in a hearing before the Parole Board.

Under the amended procedure, a defendant is given five days notice and must appear before an administrative law judge for a preliminary hearing. 501 KAR 1:070 (1), (4). The preliminary hearing may be held anywhere near the location of the alleged violation or the arrest. 501 KAR 1:070. There is no formal setting requirement as before, where the taking of evidence was done in a courtroom. The lack of formality in these proceedings inherently results in parties and witnesses underappreciating the significance of the hearing and often waiving rights without the proper forethought. Especially where the offender believes the allegations lack credibility or are frivolous, the nature of the proceedings may lead him to waive his rights at the preliminary hearing in hopes of presenting a defense at the final hearing. However, the preliminary hearing is truly the only opportunity for the offender to present and question the evidence against him or

her.[2] Further, the apparent significance of this hearing is greatly diminished by holding the hearing in a jail.

If probable cause is found, the administrative law judge must refer the case for a final hearing before the parole board. 501 KAR 1:070 (6)(b)(1). This hearing does not afford a defendant a second opportunity to present his case, as the Court of Appeals appears to believe. Instead, the defendant may admit or deny the allegations, but he has not right to present any new evidence that was not presented at the preliminary hearing. Instead, should the defendant wish to present additional evidence, he may write to the Parole Board in advance or request such an opportunity at the beginning of the final revocation hearing, but it is within the discretion of the Parole Board to deny the request. 501 KAR 1:070 (3). Disturbingly, while the Parole Board has absolute discretion, there are no procedures or standards to guide that discretion.

Lack of a Fair and Impartial Judiciary

Under the previous procedure, the revocation was presided over by a fair and impartial judiciary who was employed by a separate branch of the government than those who would benefit from a defendant's post-incarceration supervision being revoked. This independent judiciary sharply contrasts with the administrative law judges who preside over the preliminary hearings provided for in the amended procedures, who are employed by the Parole Board.

At the final revocation hearing under the new procedures, the offender's alleged violation is in front of the Parole Board, not a judge or even an officer of the court

[2] In fact, the structure of these revocation proceedings is completely backwards from any other court proceeding that defendants might be familiar with. Under any other procedure, a preliminary type of hearing is often a mere formality, while the final hearing is the defendant's opportunity to present his case. Instead, in the postincarceration supervision revocation context, the preliminary hearing is the most important stage, where evidence of innocence or mitigation must be produced.

necessarily. *See* 501 KAR 1:080, KYPB 30-02; KRS 439.320. Notably, the members of the Kentucky Parole Board are political appointees, unlike judges, who are elected to their offices.

Ironically, the revocation procedure changed because of the separation of powers problems identified in *Jones*. However, it was precisely this separation of powers that provided a system of checks and balances. The involvement of both the judicial and executive branches provided more due process protection than can be provided by having only the executive branch involved in the revocation process. While there's no question that we cannot return to the pre-*Jones* arrangement, the changes have, as a matter of law, created an ex post facto violation in applying the new procedures to defendants who committed their offenses while the old procedure was in effect.

Lack of Counsel

While there was no probable cause hearing under the previous procedure, the revocation hearing required an attorney, private or appointed, to represent the defendant, who could engage in motion practice, provide investigative services, and who would be likely given more than a mere five days to prepare for the hearing. Under the amended procedures, a defendant ***may*** have counsel present, if requested, but there is no guarantee to counsel as there was previously. 501 KAR 1:070 §1(11); 501 KAR 1:080, KYPB 30-01; 501 KAR 6:270, CPP 27-30-02, CPP 27-19-01.

Evidentiary Threshold and Lack of Opportunity to Present Evidence

The evidentiary thresholds under the amended procedures are exceedingly low and will most likely result in the defendant being re-committed to the custody of the Department of Corrections. Under the previous version of KRS 532.043, the circuit

court's determination to revoke an offender was upheld if there was evidence to support at least one violation and the offender was given notice of the allegation for which the court determined there was a violation. *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988); *Rasdon, supra*, at 718. While that is not a very high evidentiary standard, the evidentiary standard now in place upon review by the parole board is even lower.

In order to be taken back into custody, there just needs to be a finding by an administrative law judge that "there exists probable cause to believe that the offender has committed any or all of the violations alleged in the notice." 501 KAR 1:070 §1(6). At this preliminary revocation hearing, the notice that is to be given to the offender five days prior to the hearing can be amended to add additional charges, and if the defendant does not object, the notice of those additional charges is waived. The presumption is in favor of the hearing going forward. Under the previous version of the statute, the circuit court would have granted a continuance unless counsel waived the notice, the presumption being in favor of proper notice and the opportunity to defend. *See Rasdon, supra; Robinson, supra*. This is just another instance when the difference between counsel's presence or absence would make a significant difference.

Once the ALJ finds probable cause to believe a violation has occurred, a final revocation hearing may be held wherein the offender is permitted "to demonstrate that, even if conditions of postincarceration supervision has [sic] been violated, mitigating circumstances may exist which suggest that the violations do not warrant revocation or, if supervision is revoked, do not warrant returning the offender to prison." 501 KAR 1:080, KYPB 30-02. Further, to be admissible in front of the Parole Board, the mitigation

evidence must have been originally presented in the preliminary hearing or a special request must be made to present the evidence to the parole board. However, because the ALJ is only being asked to determine whether probable cause exists, presenting mitigation evidence is inappropriate for a preliminary hearing. 501 KAR 1:070 (6); 501 KAR 1:080.

The board will read the charges against the offender and the offender has the opportunity to admit or deny same. No new evidence is to be presented at the final hearing unless there are exceptional circumstances, and even then the decision is within the sole discretion of the board. 501 KAR 1:080, KYPB 30-02. Again, no rules exist to guide the discretion of the Parole Board in this matter. A request for reconsideration can be made to the Board within 21 days of its decision if there is significant evidence which was previously unavailable, there is alleged impropriety of a board member in the record, or if there is a significant procedural error by a board member. 501 KAR 1:070 §4.

Limited Reviewability and Avenues for Appeal

Where the previous procedure ended with a final order appealable directly to the Court of Appeals, there is no longer an appellate review of the factual findings for revoking a sexual offenders' supervised release. The amendment of KRS 532.043 also changed the reviewability of decisions by direct appeal. KRS 439.330(3) provides that the parole board's orders "shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560." A parole board's alleged abuse of its authority, through the failure to comply with statutory requirements, should be addressed through a circuit court proceeding seeking a writ of mandamus to compel the board to proceed properly. *Shepherd v. Wingo*, 471 S.W.2d 718, 719 (Ky. 1971). Review of the circuit court's grant

or denial of a writ of mandamus generally turns on whether an abuse of discretion occurred, although questions of law shall be reviewed de novo. *Fletcher v. Graham,* 192 S.W.3d 350, 356 (Ky. 2006). "The parole board when holding hearings under KRS 439.440 is acting as a quasi-judicial body and it is the general rule that mandamus will not lie to control the exercise of such a sound discretion." *Evans v. Thomas*, 372 S.W.2d 798, 800 (Ky. 1963), *citing Combs v. State Board of Education*, 60 S.W.2d 957 (Ky. 1933). "Mandamus is a proper remedy to compel an inferior court to adjudicate on a subject within its jurisdiction where it neglects or refuses to do so, but will not lie to revise or correct a decision [or] ... to control the discretion of an inferior court." *Kaufman v. Humphrey*, 329 S.W.2d 575 (Ky. 1959), *citing Hargis v. Swope*, 114 S.W.2d 75 (Ky. 1938).

Lack of Fair Warning and the Imposition of an Ex Post Facto Law

A "fair warning" violation occurs "[w]hen a[n] ... unforeseeable state-court [sic] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect [being] to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964). At the time all of the offenses were alleged to have occurred, the circuit court was the reviewing body for compliance with the terms of conditional discharge. However, as laid out above, the reviewing body is now under the authority of the Board and this change has significantly limited the ability of offenders to contest the allegations and findings against them. At the time that Mr. McDaniel entered his guilty plea and bargained away his right to a jury trial, KRS 532.043 did not provide for oversight of the revocation proceedings by the Board, and thus he was not given a fair

warning of the punishment to be applied by pleading guilty prior to the amendment of KRS 532.043.

The lack of due process afforded to defendants under the amended procedures for revoking post-incarceration release amount to the imposition of an ex post facto law in violation of Section 19(1) of the Kentucky Constitution and Art. 1, §10, of the United States Constitution. In order to be characterized as ex post facto, the law must 1) apply to events occurring before the enactment, and 2) disadvantage the offender. *Lattimore v. Corrections Cabinet*, 790 S.W .2d 238 (Ky.App.1990), citing *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In Mr. McDaniel's case, the amended procedures of 501 KAR 1:070, enacted in May 2011 apply to events in Mr. McDaniel's case that took place in 2009 and 2010. The current revocation procedures afford Mr. McDaniel substantially fewer safeguards and less due process than those in place prior to *Jones v. Commonwealth*, *supra*. The lack of due process is such that Mr. McDaniel faces a far greater likelihood of revocation than he did prior to *Jones*, and the Legislature's response. Thus Mr. McDaniel is substantially disadvantaged.

This case is analogous to *Garner v. Jones*, 529 U.S. 244 (2000), where the United States Supreme Court found that in order for an inmate to show that a law allowing a greater deferral periods between parole considerations violated ex post facto prohibitions, a defendant must show that the law created a significant risk of increasing his punishment. *Id.* at 254. The Court stated,

> When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

Id. at 255.

The Court of Appeals has applied this view in at least one Kentucky case. In *Gordon v. Kentucky Parole Board*, 2012 WL 917169, No. 2011–CA–000205–MR, an unpublished case attached at Tab 3, Gordon was subjected to a longer maximum deferral for parole consideration than was allowed by statute at the time of her conviction. The Court of Appeals framed their analysis this way:

> [I]n order to determine whether Gordon was subject to an unconstitutional ex post facto law, we must ask whether the application of the amended deferment statute under the facts at bar poses a sufficient risk of increasing her time of incarceration. If that question is answered in the affirmative, the amended statute cannot be applied to Gordon because such application would be ex post facto.

Id. at *1 (emphasis added).[3] There can be no doubt that a process which takes away the discretion of the supervising parole agent and the Commonwealth Attorney to decline to initiate revocation procedures, eliminates a defendant's right to counsel, exchanges a neutral decision-maker for someone employed by the party who will benefit from a revocation, lowers the evidentiary standard for revoking supervision, establishes roadblocks to presenting evidence and eliminates a defendant's ability to appeal directly

[3] Gordon's case was remanded by the Court of Appeals for factual findings about whether the change in her parole eligibility date posed a significant risk of increasing her time of incarceration by making her release less likely. Such a remand is inappropriate here. While Gordon could compare parole release rates using statistics, there is no appropriate way to determine, using statistics, whether Mr. McDaniel faces a significant risk of increasing his incarceration time because of the change in revocation procedures. This is because it is an impossible task to collate the relevant statistics. For instance, the Parole Board presumably has data available about how many people face revocation proceedings under the new procedure, and whether or not they are revoked. However, the discretion provided to individual Commonwealth's Attorneys under the old procedure means that it would be impossible to collect data about how many minor violations did not result in the filing of a motion to revoke under the old procedure. Moreover, even for motions that *were* made, the data would be held in each of Kentucky's 120 counties, as opposed to in a central location. So, while it would be an option for this Court to remand this case for factual findings on whether the new procedures statistically pose a sufficient risk of increased incarceration, this case should be instead decided on legal analysis alone. As a matter of law, the changes to the procedures create a sufficient risk of increasing incarceration time.

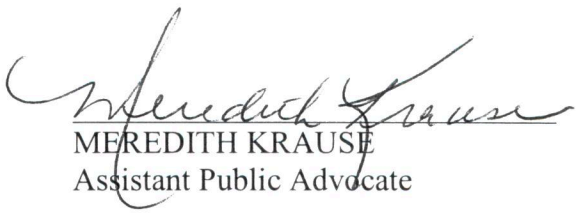
to the Court of Appeals, poses not only a sufficient but, in fact, a significant risk of increasing a defendants time of incarceration. Because the lack of due process afforded to defendants facing post-incarceration supervision revocation is so great, it amounts to an ex post facto violation, and cannot be allowed to stand.

CONCLUSION

The Court of Appeals erred in holding that Mr. McDaniel's motion should be construed as a motion made under RCr 11.42. The court further erred in finding that Mr. the current revocation process for post-incarceration supervision does not violate due process under the state and federal constitutions.

WHEREFORE, Johnathan McDaniel respectfully asks this Court to reverse the Court of Appeal's Order denying his post-conviction motion and hold that the current procedures in place to revoke post incarceration supervision violate due process protections and the use of the current revocation procedures against him would be an ex post facto violation and therefore unconstitutional.

Respectfully submitted,



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